No. 22,346

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARRY S. STONEHILL and ROBERT P. BROOKS,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the Central District of California.

PETITION FOR REHEARING.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

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Appellants, Harry S. Stonehill and Robert P. Brooks, respectfully request a rehearing in the above entitled cause, decided by a panel of this court pursuant to opinion filed December 9, 1968, and in this connection request that a rehearing of this case be held before the entire court en banc, in that this case involves an important question of constitutional law.

Grounds of Petition.

The following are the grounds upon which this petition is based:

(a) The majority of the court in its opinion of December 9, 1968 erroneously made findings of fact upon an uncontradicted record, which findings are con-

trary and different than those of the trial judge, and the Record.

(b) The majority opinion herein is in conflict with the decision of the Court of Appeals for the District of Columbia in *Powell v. Zuckert,* 366 F. 2d 634, which, although cited in appellants' briefs, is not mentioned in the majority opinion.

(c) The majority opinion of December 9, 1968 deprives United States nationals living abroad of Fourth Amendment rights in United States courts within the territorial limits of the United States.

ARGUMENT.

A. The Majority of the Court in Its Opinion of December 9, 1968, Erroneously Made Findings of Fact Upon an Uncontradicted Record, Which Findings Are Contrary and Different Than Those of the Trial Judge, and the Record.

The majority opinion limits suppression to actual physical participation by United States agents in the raids wherein the material sought to be suppressed was obtained. If on this record there can be a finding that there was no instigation or participation by United States agents, then one man can hand another man a gun and tell him to kill a third individual and completely escape legal responsibility.

After Spielman, the informer, appeared at the Embassy and told his story important United States officials at the Embassy alerted Washington by and through the sealed Exhibit E of the nature of the case and the desire to get sufficient evidence to make a tax case against appellant Stonehill and to bring Stonehill's deportation from the Philippines. Following this message to Washington agents Chandler and Hawley worked hand in glove with the Philippine officials and were always present at their meetings with Spielman. The evidence shows that Spielman would not talk to the Philippine officials without an American representative. Most of the planning for the raids was done in Chandler's home and at the two meetings between Chandler and Minister of Justice Diokno Chandler told Minister Diokno that he wanted to make a tax case against Stonehill of the net worth type and that he needed books and records for this purpose. The majority opinion states that the diagrams prepared by Chandler, Exhibits I and J, inadvertently came into the possession of Philippine officials. The district judge did not so

find and Mr. Chandler's testimony indicates that he prepared the diagrams with the assistance of Spielman and that the diagrams were used during the raids by the National Bureau of Investigation of the Republic of the Philippines. In connection with the use of the diagrams by the Philippine raiders Mr. Chandler testified:

> "Q. And you did this to help the raiders, is that correct? A. I presume that would probably be used in the raids, yes." [R. T. 366, lines 21-23].

Chandler and other agents were active during the course of the raids and actually went to certain of the locations that were raided and selected books and documents which contained material in which they were interested. There is no conflict in the record on this.

The inferences and implications from the foregoing testimony are patent. Chandler just couldn't stay away from any place where there were financial records that would help him in his tax case and he did not want to miss any bets through the inefficiency of the Philippine officials and wanted to be sure to obtain everything that Spielman told him was available. It is our considered view that upon a full consideration of the evidence in this case appellants have presented evidence which overwhelmingly establishes that United States agents instigated and participated in the raids, the fruits of which appellants are attempting to suppress in this proceeding.

The narrow view taken by the majority overlooks the overwhelming evidence in this case that the United States desired to prosecute Stonehill in a tax case, as outlined in Exhibit E; it further overlooks the fact that the United States did not have sufficient evidence from Spielman to so proceed, so took Spiel-

man by the arm to the Philippine officials and by causing the Philippine authorities to embark upon the raids secured the evidence that could not otherwise be acquired. This in our opinion, plus the physical presence of Chandler at the places raided, constitutes participation.

The court in the opinion of the majority filed December 9, 1968 made findings of fact. As the dissenting opinion notes at page 22 thereof, the trial court's findings were inadequate and the majority undertook to fill the gaps with *de novo* fact finding of its own. As the dissenting opinion further points out, for this reason alone, the case should be remanded to the trial court for further consideration and the entry of adequate findings.

B. The Majority Opinion Herein Is in Conflict With the Decision of the Court of Appeals for the District of Columbia in Powell v. Zuckert, 366 F. 2d 634, Which, Although Cited in Appellants' Briefs, Is Not Mentioned in the Majority Opinion.

While the majority opinion agrees that the raids conducted by the Philippine officials were illegal under the laws of the Philippines, the majority holds that the evidence that was obtained by and through those illegal raids is admissible, as it was obtained by United States agents from Philippine officials in a lawful manner. The majority is also mindful of the fact that had said evidence been obtained in the same manner within the territorial limits of the United States it would be inadmissible and subject to suppression. The majority rejected the doctrine of *Birdsell v. United States,* 346 F. 2d 775, which indicates that if the method of obtaining the evidence is shocking to the con-

science, the court within its inherent jurisdiction can suppress it. It is our view that if that doctrine was ever applicable, it certainly applies to the facts in this case.

In reaching the opinion that it did the majority failed to consider *Powell v. Zuckert, supra,* which involved evidence obtained in Japan under Japanese law which was used against a civil service employee of the United States wherein the Court of Appeals for the District of Columbia applied the Fourth Amendment rights to the employee and in citing *Reid v. Covert,* 354 U.S. 1, the court, at page 640, stated:

> "The obvious and decisive answer to this, of course, is that no agreement with a foreign nation can confer power on Congress or any other branch of the government, which is free from the restraints of the Constitution."

This court's opinion in *Brulay v. United States,* 383 F. 2d 345, has no applicability to the facts of this case. In *Brulay* this court relied on *Birdsell v. United States, supra.* One of the grounds for the *Birdsell* decision was the failure of the appellant in that case to raise the suppression issue as a pre-trial motion, as provided for in F.R.C.P. 41(e). In our case we are here in this court on an appeal from an adverse order on just such a motion. The second basis for distinguishing *Birdsell* is that there is no finding therein as to whether the Mexican search and seizure was illegal under Mexican law. A complete basis for distinguishing *Birdsell* from the case at bar is found in the court's own language at page 783, where the court stated:

> "Apart from the inapplicability of the Fourth Amendment to a country whose laws may not even provide, much less require, the counterpart of a search warrant, the record would afford a fair basis for a finding of consent."

Thus, as in *Brulay, Birdsell* is based upon the validity of the search and seizure under foreign law. In our case the search and seizure was found to be illegal by the highest court of the Republic of the Philippines and the court below found that the search was illegal by United States standards, so therefore, we have illegality under foreign law as well as illegality under United States law. In our case there is no suggestion of consent, but to the contrary, violent objection.

C. The Majority Opinion of December 9, 1968 Deprives United States Nationals Living Abroad of Fourth Amendment Rights in United States Courts Within the Territorial Limits of the United States.

This case involves an extremely important question of constitutional law encompassing the protection to be afforded in United States courts by the Fourth Amendment to a United States citizen living abroad, where the United States government seeks to utilize evidence seized in a foreign country, which seizure admittedly violated both the constitution of the foreign country where the seizure took place and the United States Constitution.

The majority of this court in its opinion of December 9, 1968 clearly failed to apply the doctrine of *Elkins v. United States,* 364 U.S. 206, as enunciated by the Supreme Court, under which the court, relying on its supervisory power, held that any evidence illegally seized under Fourth Amendment standards is inadmissible in a United States Court.

This court, in effect, has held that if a United States citizen living abroad is subject to an illegal search and seizure by a foreign nation and the courts of that nation find that search and seizure to be illegal, the fruits of

said search can be used in a United States court by the United States government. To so hold makes the Fourth Amendment a mere shibboleth and not one of our prized rights. Even if this court were to hold that a citizen of the United States living abroad cannot avail himself of Fourth Amendment rights, such a doctrine of law, which we seriously question in view of the decision in *Powell v. Zuckert, supra,* would not be applicable to the facts of this case. The highest court of the sovereign nation in which the searches and seizures occurred held that the same were illegal. The case at bar is one where the United States is attempting to offer this illegally secured evidence in a United States court against a citizen of the United States afer he has returned from abroad. As pointed out in the dissenting opinion, the majority has misconstrued the "silver platter" doctrine which was laid to rest in *Lustig v. United States,* 338 U.S. 74. To hold that because the United States citizen did not have Fourth Amendment rights abroad and therefore the tainted evidence is admissible would make the Constitution of the United States and the Bill of Rights a sham, farce and mockery and would further encourage the Internal Revenue Service to erode fundamental rights (see the decision of this court in *Lenske v. United States,* 383 F. 2d 20).

If the doctrine of *Brulay, supra,* means what the majority opinion seems to indicate, then a citizen of the United States when he resides abroad not only loses his constitutional rights under the Constitution of the United States, but also loses the rights to which he is entitled while he is living in a foreign country, for in the case at bar, the Philippine Supreme Court held that the search warrants against these appellants were illegal and void, and of course the district judge in this case held that said search warrants were illegal and void under the Constitution and laws of the United

States. Does the decision of this court mean to hold that both United States constitutional rights and foreign rights are abrogated merely because a United States citizen is temporarily living abroad? We do not think that that is the law nor that this court seriously desires to so hold.

The legal issue presented here is of the utmost importance. The majority opinion has completely eroded Fourth Amendment rights of United States citizens living abroad. This court has held that although the evidence obtained abroad was illegal under the laws of the country in which it was obtained and was illegal under the laws of the United States it still is admissible against United States citizens in United States courts. We do not think that this court by its decision in *Brulay, supra,* intended such a result and it is our view that this court cannot seriously adopt such a view in the case at bar. It seems to us that the decision of the Court of Appeals for the District of Columbia in *Powell v. Zuckert, supra,* contains the correct answer to this problem.

Conclusion.

It is respectfully submitted that appellants should be granted a rehearing and said rehearing should be before the entire court sitting en banc, to the end that the order of the district judge may be reversed.

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and
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Certificate.

I hereby certify that in my judgment the petition for rehearing is well founded and further certify that it is not interposed for delay.

BERTRAM H. ROSS